

IN THE SUPREME COURT OF
TURKS AND CAICOS ISLANDS
Criminal Jurisdiction

Case No: 50/06

BETWEEN

REGINA

AND

KINGSLEY ARTHUR
AND OTHERS

J Meloche for prosecution
C Barnett for Arthur

Hearing: 8 February 2010
Ruling: 9 February 2010

Reline

1. Counsel for the defendant, Kingsley Arthur, challenges the admissibility of a blood sample taken From his client for use its DNA comparison.

2. Having heard preliminary submissions on the light of the judge to exclude such evidence, I ruled there should be a trial on the voir dire in order to establish the evidence first and then to hear the submissions. The prosecution called Superintendent Baptiste and tendered the statement of Dr Panga, who actually took the sample.

3. By the Police Force Ordinance an intimate sample includes blood and the manner which it can be taken is covered by section 37B. I set out the first six Subsections:

37B (1) An intimate sample may be taken from a person in police detention only —

- (a) if there is a court order for it to be taken; and
- (b) if the appropriate consent given

(2) The court may only make an order if there are reasonable grounds —

- (a) for suspecting the involvement of the person from whom the sample is to be taken in a serious arrestable offence; and
- (b) For believing that the sample will tend to confirm or disprove his involvement.

(3) The appropriate consent shall be given in writing.

(4) Where —

- (a) a court order has been made; and
- (b) it is proposed that an intimate sample shall be taken under the court order, an officer shall inform the person from whom the sample is to be taken —
 - (i) of the court order, and
 - (ii) of the grounds for making it.

(5) The duty imposed by subsection (4) (ii) includes a duty to state the nature of the offence in which it is suspected that the person from whom the sample is to be taken has been involved.

(6) If an intimate sample is taken from a person

(a) the court order by virtue of which it was taken;
(b) the grounds for making the order; and
(c) the fact that the appropriate consent was given, shall
be recorded as soon as is practicable after the sample is taken.

4. The evidence adduced by the prosecution is that (then) Inspector Baptiste filled in an application to the Magistrate's Court for an order permitting the taking both of intimate and non intimate samples. The defendant was taken to the court on 4 May 2006. He testifies that the defendant **was** asked at the court if he consented to the sample. He agreed and signed a consent form. He also signed a witness statement, written by Imp Baptiste, that he had given permission to the police to take the blood and that no threat or promise was made to him to give the samples. Later the same day, Dr Panga went to the police station, noted the consent and took a sample of blood. Throughout, the defendant was in police custody.

5. There is no evidence of a court order having been made and Insp Baptiste told the Court that he thought the application was not pursued once the defendant indicated his consent.

6. Mr Barnett submits that the failure to follow the procedure prescribed by the Ordinance means that the blood sample was improperly taken and cannot be admitted in evidence.

7. Ms Melodic submits that the judge retains a discretion to admit or exclude it and the manner in which he exercise that discretion depends on the degree of the failure to follow the correct procedures and the bona fides of the police. She suggests that the purpose of the provision is to ensure the police can obtain evidence against a suspect. I cannot accept that is the purpose of section 37B. It provides a procedure by which the police may obtain possibly self-incriminating evidence from an accused and, for that reason, provides a strict regime which must be observed as a protection where that person is in custody.

8. Both counsel rely on dicta in the House of Lords in *R v Sang* [1980] AC 402. That case confirmed both the discretion of a judge in a criminal case to refuse to admit evidence if he considered its prejudicial effect outweighed its probative value and the long standing rule that he has no discretion to refuse to admit relevant evidence on the ground it were improperly or unfairly obtained save where the evidence is an admission or confession or evidence obtained from the accused after commission of the offence.

9. Ms. Meloche relies on the second of those statements that the court has no discretion but does not, as I understand her submission, accept that saving limits the principle. Mr. Barnett relies on both the prejudicial effect and the exception to the general rule.

10. Prior to the *Sang case*, there was little in the way of clear authority to support the contention that the court has a discretion to exclude evidence obtained unlawfully. However, having reviewed many of the earlier cases, Lord Diplock, at 437, concluded:

"(1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unlawful means. The court is not concerned with how it was obtained."

11. The scope of the saving to which he refers can be ascertained from an earlier passage, at 436, in which he referred to the dictum of Lord Goddard in *Kunima v The Queen* [1955] AC 197, 204 that a judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused and continued:

"That statement was not, in my view, ever intended to acknowledge the existence of any wider discretion than to exclude (1) 'admissible evidence which would probably have a prejudicial effect upon the minds of the jury that would be out of proportion to its true evidential value,' and (2) evidence tantamount to a self-incriminatory admission which was obtained from the defendant; after the offence had been committed, by means which would justify a judge in excluding an actual confession which had the like self-incriminatory effect.

My Lords, I propose to exclude detailed consideration of the role of the trial judge in relation to confessions and evidence obtained from the defendant after the commission of the offence that is tantamount to a confession. The underlying rationale *Of* this branch of* criminal law, though it may originally have been based on ensuring the reliability of confessions is, in my view, now to be found in the maxim *nem debet prodere se ipsum*, no one can be required to be his own betrayer or in its popular English mistranslation "the right to silence. That is why there is no discretion to exclude evidence discovered as the result of an illegal search but there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair."

12. Lord Scarman, agreeing with Lord Diplock added at 456:

"If an accused is misled or tricked into providing evidence (whether it be an admission or the provision of fingerprints or Medical evidence or some other evidence), the rule against self-incrimination *nemo tenetur se ipsum prodere* — is likely to be infringed. Each case must, of course, depend on its circumstances. All I would say is that the principle of fairness, though concerned exclusively with the use of evidence at trial, is not susceptible to categorisation or classification and is wide enough in some circumstances to embrace the way in which, after the crime, evidence has been obtained from the accused:"

13. The Ordinance requires various steps to be complied with in order to protect an accused man in custody with the police. It requires both a court order and the consent of the accused person; subs (1). It requires the court, before making an order; to be satisfied of the grounds in subs (2) (i) and (ii) and that the person from whom the sample is to be taken shall be told of the order, subs 4 (i), and of those grounds subs (4)(ii). It also provides that these matters should be recorded as soon as practicable. None of these were observed by the police in the present case.

14. The result is that he was improperly induced to provide evidence against his interest. The clear result of the exception to the second rule stated by Lord Diplock is to allow the judge, in such a case, a discretion whether or not to exclude such evidence as he has with an application to exclude a written confession taken improperly or unfairly.

15. The Ordinance provides a *clear* procedure which must be followed to ensure the accused, when and if he gives his consent, is able to make a fully informed decision, if it is not followed, the accused's consent cannot be said to have been fairly obtained and he has, therefore, been improperly deprived of his right not to incriminate himself. That is the case here and resulted in the blood being unfairly and improperly obtained.

16. I am satisfied it must be excluded and I so order.

Gordon Ward
Chief Justice

